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No. 90-108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

S. EZRA AUSTERN and ESTHER AUSTERN,

Petitioners,

—against—

THE CHICAGO BOARD OPTIONS EXCHANGE, INC.,

Respondent.

REPLY BRIEF IN FURTHER SUPPORT OF PETITION

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REPLY BRIEF

This is a reply brief. It deals essentially with new arguments advanced by respondent and specific matters in its brief which seem in most urgent need of correction.

Issues

In its brief in opposition to the petition, the CBOE has fuzzed and distorted central issues herein - whether there was agreement to submit to an arbitration panel consisting exclusively of members of the securities industry,

and whether such panel's conduct of an arbitration hearing was, by virtue of its counterfeit nature, totally lacking in jurisdiction.

Petitioners are not requesting the court to review any factual finding that there was agreement to arbitrate. In its May 19th, 1989 decision, the Northern District Court of Illinois found that there was agreement to submit generally to an arbitration sponsored by the CBOE. Implicit in the court's findings was that such submission was to be in accordance with the rules of the CBOE, which had been incorporated by reference into the agreements of the parties. (A-28,29,35,36,41) These rules required that notice of hearing be given (A-43), and that a majority of the arbitrators be from outside the securities industry. (A-51) No notice was given (A-43), and all of the

arbitrators were from the securities industry. (A-51) The panel of arbitrators, having been constituted in flagrant violation of the agreement of the parties, including such rules, was a bastard tribunal totally lacking in jurisdiction.

These matters - contractual agreement as to the composition of the panel and its lack of jurisdiction - were not addressed by such District Court. No factual findings as to the specific panel were ever made. Therefore, such matters cannot be the subject of collateral estoppel. Indeed both the District Court below and the Court of Appeals, affirming its decision, have failed to address these questions and thereby have committed error.

Respondent's reference on page i of its brief to "errors in the arbitration process" is an attempt to gloss over and

minimize wrongdoing that ipso facto converted the actual arbitration hearing held into a process never contractually agreed upon. These wrongs negated and eviscerated the voluntary nature of petitioners' submission to such arbitration.

Respondent's question number 2 on page i - whether recovery can be had from "the arbitration forum" - is an attempt to confuse and equate the sponsoring CBOE with the arbitration panel. The forum herein was not the CBOE itself but the arbitration panel selected by it. Petitioner seeks recovery not from the panel, which constituted the forum, but from the CBOE in its role as sponsor.

Respondent has reduced the issue of due process to whether or not there was state action to justify a constitutional claim, and whether immunity for judicial acts extends to constitutional violations.

Respondent chooses to disregard the real issue that arises from petitioners' first cause of action (A-43) - whether the absence of due process (irrespective of state action) precludes a commercial sponsor's claim for immunity for administrative (not judicial) wrongdoing.

Facts

Respondent in its brief has made misstatements of fact and stated half truths and distortions which warrant correction:

1. (P. 2) The Austerns have not claimed that CBOE's wrongs precipitated the "arbitration defeat." They have claimed that such arbitration was conducted without notice to petitioners by a spurious panel of arbitrators in violation of the agreement of the parties and the CBOE rules. (A-51) Confirmation of the "award" that issued from such panel

was denied by the District Court in Illinois. (A-44,45,46) It was therefore a nullity, not a defeat.

2. (P. 5) The Austerns jointly had no trading account. Only Esther Austern had such an account. Neither petitioner had any obligation to pay for any deficit balance. Esther Austern was a limited partner with no personal liability beyond her investment, and S. Ezra Austern, not a party to the partnership agreement, had no liability whatsoever.

3. (P. 5 and 6) Before ever requesting CBOE arbitration, Fried in or about March, 1984 instituted proceedings in the Bais Din (religious court) in Israel. This was an action to recover monies, not to compel arbitration. There was no request for CBOE-sponsored arbitration until September, 1984, six months later.

4. (P. 7) Petitioners never tried to

avoid arbitration as such. They did try to avoid arbitration with an entity different from the one that was a party to the original partnership agreement and Bais Din agreement. They were not averse to arbitration in accordance with the agreement of the parties and the rules of the CBOE, which were incorporated into such agreement. (A-28,29)

5. (P. 7) Reference to the decision contained in CBOE's letter of August 16th, 1985 conspicuously omits the CBOE's acknowledgement therein that arbitration was to be in accordance with CBOE rules (and its specific determination) that a majority of the arbitration panel would not be from the securities industry. (A-51)

6. (P. 8) The so-called "finding" of the arbitration panel that "all parties had a full opportunity to present arguments and evidence" was a gratuitous,

self-serving statement which has been given no credence or effect by any judicial trbunal herein. Petitioners had no notice whatsoever of the arbitration hearing, which was conducted without their knowledge or presence. (A-43)

7. (P. 10 and 14) The Illinois Court ruled that the parties had agreed to submit to arbitration "before the CBOE".(A36) This did not mean that the CBOE as such had jurisdiction to arbitrate. It meant only that a panel of arbitrators duly appointed in accordance with the agreement of the parties and the CBOE rules had jurisdiction to arbitrate. (A-28,29)

8. (P. 13) Petitioners do not request review of the agreement to arbitrate. They acknowledge that there was such agreement to arbitrate, and that the CBOE had jurisdiction to sponsor arbitration. But the CBOE had no power to

confer jurisdiction upon an arbitration tribunal selected unless such selection complied with the agreement of the parties and the exchange rules which had been incorporated therein. There was no such compliance.

Additional Reasons for Granting the Writ

I. THE DETERMINATION BELOW IS IN CONFLICT WITH WELL-SETTLED LAW AND PRIOR DECISIONS OF THIS COURT.

In the case at bar immunity is sought (a) by a commercial sponsor of arbitration (b) for administrative errors and omissions performed in a stage preliminary to the adjudicative phrase, including (c) the failure to provide any notice of the arbitration hearing, (d) which was conducted by arbitrators selected exclusively from the securities industry in violation of the agreement of the parties, the CBOE's own rules and its specific determinations.

While the doctrine of absolute immunity shields judges from damage liability, this Court has limited immunity to situations where there was a clear presence of jurisdiction and there was an exercise of a judicial function. Bradley v. Fisher, 80 U.S. 335; and Stump v. Sparkman, 435 U.S. 349. In the case at bar the arbitration panel selected by the CBOE was totally lacking jurisdiction, and the acts of the CBOE complained of were not acts of a judicial nature. The determination below is inconsistent with the holdings and not in accord with the dicta of these two landmark decisions of this Court.

The doctrine was extended to include a police officer acting in good faith and with probable cause in making an arrest. Pierson v. Ray, 386 U.S. 547; a prosecutor's activities "intimately associated with the judicial phase". Imbler v.

Pachtman, 424 U.S. 409, 430; and to government officials performing quasi-judicial functions. Butz v. Economou, 438 U.S. 478. But this Court has never extended immunity to a commercial sponsor, or indeed any sponsor, of arbitration acting as an administrative arm of an arbitration tribunal. In the Imbler decision this Court at p. 430 expressly excluded from consideration "those aspects of the prosecutor's responsibility that cast him in the role of an administrator..." (underlining supplied)

Under the doctrine of "functional comparability", which the court has defined in Forrester v. White, 108 S.Ct.538, 542-544, and Butz v. Economou, 438 U.S. 478, 512-513, the criterion for the application of immunity is whether the act complained of was an act comparable to that of a judge in his judicial capacity. The

failure of the CBOE to give notice, and its selection of arbitrators exclusively from the securities industry, were administrative, not judicial acts, and warrant no protection, since such criterion has not been met. The determination below is accordingly in error and should be reviewed by this Court.

II. WHETHER OR NOT IMMUNITY SHOULD BE EXTENDED TO A COMMERCIAL SPONSOR OF ARBITRATION FOR ADMINISTRATIVE ACTS OR OMISSIONS PRIOR TO ACTUAL ARBITRATION IS A QUESTION OF LAW WHICH SHOULD BE DECIDED BY THIS COURT.

Corey v. New York Stock Exchange, 691 F.2d 1205, (6th Cir.) is the only appellate precedent extending immunity to a commercial sponsor of arbitration. As pointed out in the petition herein, however, Corey is not apt, because it is distinguishable from the case at bar in numerous respects, including notice of the hearing, jurisdiction of the arbitrators

and contractual agreement as to the arbitration hearing.

In Ozark Air Lines, Inc. v. National Mediation Board, 797 F.2d 557, the Eighth Circuit* reversed a judgment directing rescission by the National Mediation Board of its appointment of an arbitrator on the ground that no justiciable controversy existed. There was no issue whatsoever as as to NMB's immunity from liability for damages. Furthermore, the case at bar does not involve an impartial and innocent board but rather a partisan commercial establishment, which was guilty of a variety of wrongs.

The law as to whether immunity should be extended to cover a commercial sponsor of arbitration for administrative acts or

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* Letter dated July 20th, 1990 of the United States Court of Appeals, 2d Circuit, written by the clerk of the court indicates that the court erred in its opinion in referring on page 2302, line 12, to the 9th Circuit. The Eighth Circuit case of Ozark Air Lines was intended.

omissions prior to actual arbitration is anything but settled. The case at bar is unique in that the arbitration panel acted in the total absence of jurisdiction, and no notice whatsoever of the arbitration hearing was given to petitioners. In this respect no case cited by respondent is even remotely similar or applicable. This includes the line of clerk, receiver and commissioner cases cited by respondent holding such officials immune from damage claims. All these cases involved government judicial officers, not a commercial establishment sponsoring arbitration. In none of these cases was there any question as to the competence or authority of the judicial tribunal with whom the court official was associated. In each case the clerk or officer was treated as an extension of a duly constituted judicial tribunal. In the case at bar the CBOE-selected

panel of arbitrators was, as pointed out above, a bastard panel without competence or jurisdiction, violative of the agreement of the parties, and the product of a flagrant violation of CBOE's own rules and specific determination.

CBOE's analogy between a judicial or quasi-judicial officer and a commercial sponsor of arbitration overlooks critical distinctions between arbitrators, court clerks, receivers and the like on the one hand, and a commercial sponsor of arbitration like the CBOE on the other. Arbitrators, like judges and court clerks, take oaths of office. Sponsors and their officials do not. The arbitrator may issue subpoenas, rule on propriety of evidence, conduct hearings and make decisions. His action is subject to review and confirmation by a court of competent jurisdiction. The sponsor can

do none of these things, and its conduct is not subject to any review. Court clerks, receivers and commissioners are responsible to a higher authority, such as the court. Officials of a commercial sponsor are responsible to nobody except perhaps the members of their organization, in this case a partisan and securities dealer-oriented body.

In view of the total absence of precedent by this court on the issue of extension of arbitral immunity to a sponsor of arbitration, and in view of the paucity of authority generally on the matter, it is appropriate that review be had.

III. THE ISSUE OF WHETHER THE ABSENCE OF DUE PROCESS PERTAINING TO AN ARBITRATION HEARING SPONSORED BY A COMMERCIAL SPONSOR PRECLUDES IMMUNITY HAS NEVER BEEN DECIDED BY THIS COURT OR ANY CIRCUIT COURT, AND ACCORDINGLY, CERTIORARI TO REVIEW SHOULD BE GRANTED.

Petitioners' complaint contains two

separate and distinct counts of due process. The first cause of action alleges failure to give any notice of the arbitration hearing and the conduct of same without their knowledge or presence. (A-43) The second cause of action alleges deprivation of constitutional due process.(A-49) Assuming arguendo that the want of state action bars recovery on such second count, it surely does not bar recovery on the first.

Respondent misses the point.The want of state action neither converts the wrongful failure to give notice into a virtue, nor magically invests same with propriety. The question is not whether there was or was not state action to justify a claim of consitutional due process. The question is whether the simple absence of due process (with or without state action) precludes a commercial

sponsor's right to immunity. Petitioners' complaint, accepted as true for purposes of this petition, shows a clear absence of due process, inasmuch as no notice whatsoever of the arbitration hearing was given. It is submitted that such absence of due process rules out any right of immunity.

In support of its contention that immunity extends to liability for constitutional violations, respondent on p.23 of its brief cites three Supreme Court cases. In none of these was there an issue as to notice or due process. Stump v. Sparkman, supra, cited by respondent, dealt with a judge's immunity relating to the exercise of a judicial function. Pierson v. Ray, supra, dealt with a judge and a duly-constituted police officer, who made arrest in violation of civil rights. In Butz v. Economou, supra, the Court, far from unconditionally extending immunity to

claims of constitutional violations, noted at page 505:

> The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees.

The instant case does not involve a judge, officer or any kind of government official. It involves a commercial establishment in the role of arbitration sponsor. It does not involve a judicial act or one functionally comparable to same. It involves the failure to give notice of the arbitration hearing, an administrative act.

All of the remaining cases cited by respondent on this matter deal with the narrow technical question of whether the failure to allege state action precludes a constitutional claim. Surely insofar as petitioners' first cause of action is concerned, they are not apt. Not one case

cited deals with the issue of whether the simple absence of due process precludes the right to immunity. This question has never been decided by this Court, and does not appear to have been decided by any circuit court. The grant of certiorari is accordingly warranted.

Conclusion

The petition for certiorari should be granted,

Dated: Brooklyn, New York
September 1, 1990

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